

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

In re: USA COMMERCIAL MORTGAGE) OCTOBER 19, 2009
 COMPANY,) E-Filed: 10/27/09

Debtor.

) Case No.
) BK-S-06-10725-LBR
) Chapter 11

In re: USA INVESTMENT PARTNERS,)
 LLC,)

Debtor.

) Case No.
) BK-S-07-11821-LBR
) Chapter 11

In re: THOMAS A. HANTGES,)

Debtor.

) Case No.
) BK-S-07-13163-LBR
) Chapter 11

USACM LIQUIDATING TRUST,)

Plaintiff,

vs.

) Adversary No.
) 08-01125-LBR

EAGLE RANCH, LLC, et al.,)

Defendants.

USACM LIQUIDATING TRUST, et al.,)

Plaintiffs,

vs.

) Adversary No.
) 08-01135-LBR

WELLS FARGO BANK, N.A.,)

Defendant.

Proceedings recorded by electronic sound recording;
 transcript produced by transcription service.

1	USACM LIQUIDATING TRUST,)	
)	
2	Plaintiff,)	
)	
3	vs.)	Adversary No.
)	08-01127-LBR
4	AMESBURYPORT CORPORATION,)	
)	
5	Defendant.)	
)	
6	LISA M. POULIN, TRUSTEE,)	
)	
7	Plaintiff,)	
)	
8	vs.)	Adversary No.
)	09-01120-LBR
9	PAUL JOSEPH MARRON, et al.,)	
)	
10	Defendants.)	
)	
11	USA CAPITAL DIVERSIFIED TRUST)	
	DEED FUND, LLC,)	
12)	
	Plaintiff,)	
13)	
	vs.)	Adversary No.
14)	08-01041-LBR
	THOMAS A. HANTGES,)	
15)	
	Defendant.)	
16)	
	USACM LIQUIDATING TRUST,)	
17)	
	Plaintiff,)	
18)	
	vs.)	Adversary No.
19)	08-01042-LBR
	THOMAS A. HANTGES,)	
20)	
	Defendant.)	
21)	

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1 ROBERT J. KEHL,)
)
2 Plaintiff,)
)
3 vs.) Adversary No.
) 08-01040-LBR
4 THOMAS A. HANTGES,)
)
5 Defendant.)
)
6 _____)
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10

11 TRANSCRIPT OF PROCEEDINGS
12 OF
13 HEARING RE: MOTIONS
14 VOLUME 1
15 BEFORE THE HONORABLE LINDA B. RIEGLE
16 UNITED STATES BANKRUPTCY JUDGE

17 Monday, October 19, 2009

18 3:00 p.m.

19
20
21
22
23 Court Recorder: Liberty Ringor

24 Proceedings recorded by electronic sound recording;
25 transcript produced by transcription service.

1 APPEARANCES:

2 For USACM Liquidating Trust: ROB CHARLES, JR., ESQ.
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8 For Certain Direct Lenders: JANET L. CHUBB, ESQ.
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12 For USA Commercial Mortgage Company and USA Capital Diversified Trust Deed Fund, LLC: MARC A. LEVINSON, ESQ.
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15 For USACM Liquidating Trust, Geoffrey L. Berman, Michael W. Carmel: ALLAN B. DIAMOND, ESQ.
J. MAXWELL BEATTY, ESQ.
STEPHEN T. LODEN, ESQ.
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19 For the United States Trustee: AUGUST B. LANDIS, ESQ.
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22 For Asset Resolution, LLC: RANDOLPH L. HOWARD, ESQ.
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1 APPEARANCES (Cont.):

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10 For the Trustee, TALITHA B. GRAY, ESQ.
11 Lisa M. Poulin: Gordon & Silver, Ltd.
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13 For Amesburyport ROGER DOWD, ESQ.
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16 For Thomas A. Hantges: JASON C. FARRINGTON, ESQ.
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20 Michael W. Carmel: Steptoe & Johnson, LLP
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(Telephonic)

22 Also Present: GEOFFREY L. BERMAN
23 Trustee
Development Specialists, Inc.
24 Wells Fargo Center
333 South Grand Avenue
25 Suite 4070

1 APPEARANCES (Cont.):

2 Also Present: MICHAEL TUCKER
3 Manager
4 USA Capital Diversified
Trust Deed Fund, LLC

5 MICHAEL W. CARMEL
6 Chapter 11 Trustee
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1 (Court convened at 03:03:28 p.m.)

2 THE COURT: Be seated. Okay. USA Commercial.
3 Appearances, please.

4 MR. CHARLES: Good afternoon, your Honor.
5 Rob Charles from Lewis and Roca on behalf of the
6 USACM Liquidating Trust. Geoffrey Berman, the Trustee, is
7 present with us.

8 MS. CHUBB: Good afternoon, your Honor. Janet Chubb
9 of Jones Vargas for certain direct lenders.

10 THE COURT: Okay.

11 MR. LEVINSON: Good afternoon, your Honor.
12 Marc Levinson appearing on behalf of USA Commercial,
13 Capital Diversified Trust Deed Fund, LLC, the revested debtor.
14 Michael Tucker, the manager of Diversified, is in the courtroom
15 as well.

16 THE COURT: Okay.

17 MR. DIAMOND: Good afternoon, your Honor.
18 Allan Diamond with Diamond McCarthy on behalf of the
19 USACM Liquidating Trust and Mr. Berman.

20 MR. LANDIS: Good afternoon, Judge. Augie Landis,
21 Assistant United States Trustee.

22 MR. HOWARD: Good afternoon, your Honor.
23 Randolph Howard, Kolesar & Leatham, appearing of behalf of
24 Asset Resolution, LLC, only.

25 MR. BEATTY: Good afternoon, your Honor. Max Beatty

1 of Diamond McCarthy on behalf of the USACM Liquidating Trust.

2 MR. CARMEL: Good afternoon, Judge. Michael Carmel,
3 the Chapter 11 Trustee in the Hantges case.

4 THE COURT: Okay.

5 MR. BURGER: Good afternoon, your Honor.
6 Jerome Burger on behalf of Marron & Associates.

7 THE COURT: Okay.

8 MR. LARSON: Good afternoon, your Honor. Kent Larson
9 on behalf of Wells Fargo Bank in the matter which is matter
10 No. 37.

11 THE COURT: All right.

12 MS. GRAY: Good afternoon, your Honor. Talitha Gray
13 on behalf of Lisa Poulin, the Chapter 11 Trustee for
14 USA Investment Partners.

15 THE COURT: All right.

16 MR. DIAMOND: Your Honor, I forgot. Allan Diamond.
17 I may also be here on behalf of Mr. Carmel as the trustee in
18 the Hantges case.

19 THE COURT: Okay. Before I forget, this not on our
20 calendar, but I need to get something straightened out. In the
21 USA versus Fulton matter, I rendered findings of fact and
22 conclusions of law on the record, and I don't have an order on
23 that, yet.

24 Now, maybe it was because the other party should have been
25 preparing it, but if you could check on that because we need to

1 get that to the district court.

2 MR. BEATTY: Your Honor, it was my understanding that
3 it is in the hands of the defendant right now. I'll go ahead
4 and make sure to contact them and advise them that the Court is
5 expecting an order --

6 THE COURT: Yes.

7 MR. BEATTY: -- and findings of fact shortly.

8 THE COURT: Thank you very much.

9 MR. BEATTY: No problem.

10 THE COURT: All right. So the first thing I have is
11 item No. 2, the Trust vs. Eagle Ranch, et cetera. Is anybody
12 here on that? Technically, that --

13 THE CLERK: Oh.

14 THE COURT: Sorry.

15 THE CLERK: No. They had called me earlier today and
16 just stated they wouldn't be showing up due to the settlement
17 on the Eagle Ranch part only.

18 THE COURT: Okay.

19 THE CLERK: So --

20 THE COURT: I think I certified this matter to the
21 district court to go forward on the Monaco portion.

22 MR. BEATTY: Your Honor, that is correct --

23 THE COURT: Okay.

24 MR. BEATTY: -- on the Monaco portion. I believe you
25 did certify that to go. The matter that was on the docket

1 related to Eagle Ranch --

2 THE COURT: Which was settled --

3 MR. BEATTY: -- should have been mooted --

4 THE COURT: -- correct?

5 MR. BEATTY: -- by the settlement.

6 THE COURT: Okay.

7 MR. BEATTY: Yes.

8 THE COURT: Thank you. All right.

9 First, we have the 21st objection to proofs of claim. And
10 when I say first, I'm going by my calendar docket, necessarily.
11 Obviously, the 21st isn't the first.

12 MR. CHARLES: And I apologize. I wish we could
13 come up with a cleverer way to relate these things to the
14 Court.

15 But as you can tell from the court file, we filed an
16 omnibus objection, and we have not received a response from
17 Norman and Karen Kibbon (phonetic), and we would ask that the
18 objection be sustained with respect to those folks.

19 THE COURT: And was it continued because there was a
20 problem with notice to them?

21 MR. CHARLES: Let me ask my partner, Mr. Hinderaker,
22 who I think is on the telephone.

23 THE COURT: Okay.

24 MR. HINDERAKER: Yes, your Honor. This is
25 John Hinderaker. It was continued because of a notice issue

1 that was corrected.

2 THE COURT: Okay. All right. So that's sustained.
3 All right.

4 Next, we have the 22nd objection.

5 MR. CHARLES: Let's just make Mr. Hinderaker
6 perform --

7 THE COURT: All right.

8 MR. CHARLES: -- for a while.

9 THE COURT: That's fine, and he asked for permission
10 to appear since you were going to be here, so --

11 MR. CHARLES: Thank you.

12 THE COURT: All right. So on the 22nd omnibus
13 objection for lack of documentation.

14 MR. HINDERAKER: Again, this is an objection where
15 there was no documentation for the claims. We requested
16 documentation from the claimants, and then when we didn't get
17 it we filed the motion.

18 There was one claimant who then supplied the information
19 to document their claim. That's Don Marshall (phonetic), so we
20 would ask that the Court sustain the objection as to all of the
21 claimants, except for Mr. Marshall.

22 THE COURT: All right. So that's sustained. Let me
23 skip the distribution motion for a moment and go to the less
24 controversial matters.

25 Next, we have the objection to claim of Rocklin/Redding.

1 MR. HOWARD: Yes, your Honor. The Rocklin/Redding,
2 LLC, filed 11 claims total. The first ten claims related to
3 individual loans. The 11th claim was sort of a catchall that
4 related to all of the same loans, and it was for \$2,000,000.

5 Accordingly, we have objected to that last claim for
6 \$2,000,000 as duplicative, and we would ask that the Court
7 sustain the objection as there was no response filed.

8 THE COURT: All right. That's sustained.

9 Next, we have the double-counted claims.

10 MR. HINDERAKER: There's quite a few omnibus
11 objections related to double-counted claims. Your Honor, if
12 you had a chance to look at one of the objections, essentially,
13 there were 300-plus claimants who filed claims where on the
14 proof-of-claim form they inserted an amount for secured claims,
15 the same amount for unsecured claims, and then the same amount
16 again for total claims.

17 And I've talked to some of these claimants. What they
18 were trying to do was cover all of their bases. The practical
19 effect of this, however, was that the claims agent inserted
20 into the claims registry two separate claims for the same
21 amount.

22 So now that those secured claims have been converted into
23 unsecured claims, essentially, all of these claims are for
24 double the intended amount of the claim.

25 THE COURT: Okay. So they'll still have the one part

1 of it. In other words, we're just taking out the duplicative
2 part, correct?

3 MR. HINDERAKER: Yes. And to explain further on some
4 of these, we have objected. You know, they'll be multiple-loan
5 claims, and we will have objected to part of the claim that was
6 related to a particular loan. And in those cases, the double
7 amount has been removed, so we are accounting for that.

8 When this process is completed, they'll have one amount
9 which corresponds to the actual amount of a remaining
10 unresolved claim for that particular claimant.

11 THE COURT: Okay. So that takes care of the 1st
12 through 7th objection, and that's calendar matters 8 through
13 14.

14 And then No. 15 the mailing list wasn't attached. Both
15 exhibits were of the notice of hearing. I assume that's just a
16 -- you've got a corrected certificate of mailing on the 8th
17 omnibus objection?

18 MR. HINDERAKER: I am not sure. I'll have to check
19 that, your Honor.

20 THE COURT: Okay. So maybe you could have somebody
21 check that even while we're looking. In other words,
22 Docket 7509 was supposed to have the mailing list attached, but
23 it had had the notice of hearing as opposed to the mailing
24 list.

25 MR. HINDERAKER: Right. And I think there were a

1 number of these that we did correct, but I just want to go and
2 check that to make sure this was the one.

3 THE COURT: Okay. So we'll come back on that one.

4 MR. HINDERAKER: Yes.

5 THE COURT: And the 9th objection is also the double
6 claims, correct?

7 MR. HINDERAKER: Yes, your Honor.

8 THE COURT: All right. And that's sustained.

9 And then No. 17 the same problem as we had with No. 8.

10 MR. HINDERAKER: Yes.

11 THE COURT: So --

12 MR. HINDERAKER: I'll double-check that.

13 THE COURT: Okay. And the 11th objection is
14 sustained.

15 And the 12th and the 13th, you amended the mistake,
16 correct, in your --

17 MR. HINDERAKER: I believe that's correct.

18 THE COURT: Okay.

19 MR. HINDERAKER: But why don't you let me
20 double-check that and come back when we come back --

21 THE COURT: Okay.

22 MR. HINDERAKER: -- on all these.

23 THE COURT: All right. And the 14th is a double
24 count as well, correct?

25 MR. HINDERAKER: Yes. That's correct, your Honor.

1 THE COURT: All right. So that's sustained.

2 The 15th is sustained.

3 The 16th is sustained.

4 The 17th, Court No. 24 has the same problem on the notice,
5 so you can check that as well.

6 The 18th is sustained.

7 The 19th, why don't you discuss that for a moment because
8 I understand there's a stipulation here.

9 MR. HINDERAKER: Yes. There was a stipulation with
10 the Roches (phonetic). They contacted us and gave us
11 additional documentation related to the claim.

12 And what they demonstrated to us was that the intended
13 amount of their claim was equal to the doubled amount of their
14 claim, and, therefore, we're withdrawing the objection as to
15 the Roche claim which is claim No. 2294.

16 THE COURT: Okay. So --

17 MR. HINDERAKER: So we would ask that the Court
18 sustain the remainder of the objections.

19 THE COURT: All right. The rest are sustained.

20 Then we have the 20th, and that's an amendment was there,
21 and that's granted.

22 And the 21st is sustained.

23 The 22nd is sustained.

24 The 23rd is sustained.

25 Now, we have the Caret No. 31, the omnibus objection to

1 proofs of claim based upon Arapahoe Land.

2 MR. HINDERAKER: Yes, your Honor. This relates to a
3 claim that was transferred to Silar for servicing, and our
4 understanding from the servicer is that this claim was paid,
5 and the claimants were paid, and there was no response to our
6 objection.

7 THE COURT: All right. So it's sustained.

8 And the 24th double counted is the same as the previous
9 ones we have discussed, correct?

10 MR. HINDERAKER: Yes, your Honor.

11 THE COURT: All right. That's sustained.

12 And the 25th is sustained.

13 Now, we have No. 34, the objection to proofs of claim
14 based on Rio Rancho.

15 MR. HINDERAKER: Yes, your Honor. This was a
16 \$2,000,000 loan. The loan was performing at the time that it
17 was transferred to Compass for servicing.

18 It's our understanding that the direct lenders were paid
19 because the borrower paid the loan, and, consequently, we filed
20 the objection, and there was no response to the objection.

21 THE COURT: All right. That's the same. Sustained.

22 Then we have the 26th which is double counted. That's
23 sustained. All right. That's all of yours for the moment,
24 correct?

25 MR. HINDERAKER: Yes, your Honor.

1 THE COURT: Okay. So, next, let's go to item No. 36
2 on the calendar, the Trust versus Amesbury, the motion to
3 approve settlement.

4 MR. DOWD: Yes. Roger Dowd for
5 Amesburyport Corporation is here, your Honor.

6 MR. BEATTY: Max Beatty on behalf of the
7 Liquidating Trust, your Honor.

8 THE COURT: Okay.

9 MR. BEATTY: Your Honor, in this matter, the Trust
10 filed suit against Amesburyport seeking to recover
11 approximately 2.8 million dollars in funds transferred to
12 Lawyers Title for the benefit of Amesburyport Corporation.

13 After settlement negotiations, the parties came to a
14 mutually-agreeable settlement wherein Amesburyport would enter
15 into a stipulated judgment for the full 2.8 million dollars.

16 And, in turn, the USACM Liquidating Trust would drop the
17 remainder of its claims, and we would come to the end of this
18 litigation as well as releasing the estate of Mr. Sullivan.

19 THE COURT: Okay. And I have forgotten. Are there
20 payment terms set out in there?

21 MR. BEATTY: Your Honor, there are not payment terms
22 set out. In particular, the issue that we've run across with
23 Amesburyport is Amesbury provided the Trust with financial
24 information to accompany the settlement discussion wherein the
25 Trust learned that, essentially, Amesburyport holds but one

1 asset. That asset is land which is subject to a lien right
2 now. It's fully liened.

3 The stipulated judgment itself provides protection to the
4 Trust in the offhanded situation which this one asset is sold
5 for a value that exceeds the amount of the liens.

6 The Trust would then be able to take its share from the
7 estate and winding up the affairs of Amesburyport which is the
8 reason why we've taken this path to settlement.

9 THE COURT: Okay. So you have a judgment, so you can
10 execute on it.

11 MR. BEATTY: Yes. That's correct, your Honor, and it
12 would --

13 THE COURT: Okay.

14 MR. BEATTY: -- also allow us --

15 THE COURT: A lien.

16 MR. BEATTY: -- where fit to take postjudgment
17 discovery to see if we can find any other assets --

18 THE COURT: Okay.

19 MR. BEATTY: -- that Amesbury had.

20 THE COURT: All right. There has been no opposition,
21 so I find that makes the test of A&C Properties weighing the
22 cost of the litigation with the results and approve that one.
23 Did we have a trial set on that? We did not, did we?

24 MR. BEATTY: No, we didn't, your Honor.

25 THE COURT: Okay. Thank you.

1 MR. BEATTY: Thank you.

2 THE COURT: Next, we have the Trust versus
3 Wells Fargo.

4 MR. LARSON: Good afternoon, your Honor. Kent Larson
5 on behalf of Wells Fargo Bank.

6 THE COURT: Okay. I guess is there an -- there's no
7 opposition to file the amended document; is that correct?

8 MR. LARSON: That's my understanding, your Honor.

9 THE COURT: Okay. So that's granted.

10 While I have you all here, we need to get that order
11 finished in -- I don't know when I set that show-cause hearing,
12 but I've got dueling orders, so let's just take a moment and
13 discuss that if we can.

14 Who drafted that order? Is he -- no. I think Mr. Yoder
15 drafted that. Anybody know the dueling order in the
16 Wells Fargo matter?

17 MR. LARSON: I don't know, your Honor. I saw them.
18 I saw the dueling orders, but I don't know the status that
19 they're presently in, so --

20 THE COURT: Okay. This is the one where nobody gave
21 me an order. You appealed it which is fine.

22 MR. LARSON: That's right.

23 THE COURT: But nobody gave me an order, and I needed
24 an order.

25 MR. DIAMOND: Allan Diamond on behalf of the Trust,

1 your Honor, and I apologize. I think one of my partners,
2 Lisa Tsai, was supposed to be on the line who was handling it.

3 But I don't know if she is because I haven't heard
4 anything, so I think the answer to the Court's question is that
5 we did submit --

6 THE COURT: Well, you did submit one.

7 MR. DIAMOND: Right. And it --

8 THE COURT: But you put all the findings and
9 conclusions in.

10 MR. DIAMOND: Okay.

11 THE COURT: What I really needed was just an order,
12 so we could short-circuit the order to show cause that's set
13 for a hearing and short-circuit this all by just putting an
14 order in that says the Court having made its findings and
15 conclusions on the record, and that rules -- I think it was
16 like arbitration was not appropriate. In other words, just put
17 the bottom line in. Don't try --

18 MR. DIAMOND: We'll get --

19 THE COURT: -- and recite findings and conclusions.

20 MR. DIAMOND: We'll get that to you immediately.

21 THE COURT: Okay. And I think that will take care of
22 Wells Fargo's problem. I think that was --

23 MR. LARSON: I --

24 THE COURT: -- their objection --

25 MR. LARSON: I would think --

1 THE COURT: -- as well.

2 MR. LARSON: -- it would, yes.

3 THE COURT: Okay.

4 MR. LARSON: Thank you, your Honor.

5 THE COURT: Thank you very much.

6 MR. DIAMOND: Thank you, your Honor.

7 THE COURT: All right. Next, we have -- that's
8 USA Investment Partners, so let me go back now to the motion to
9 distribute, item No. 6.

10 MR. CHARLES: Your Honor, Rob Charles from
11 Lewis and Roca on behalf of the Trust. The motion presented
12 some things that I thought might be complicated, but not
13 controversial, and then there is an objection.

14 What I'd like to do if it's all right with you and be
15 brief about it is kind of work you through what I thought was,
16 perhaps, complex, but not controversial --

17 THE COURT: Let me ask --

18 MR. CHARLES: -- and then deal --

19 THE COURT: -- a question --

20 MR. CHARLES: -- with the objection.

21 THE COURT: -- before we start. I see there's a
22 notice of filing bankruptcy by Asset --

23 MR. CHARLES: Asset Resolution --

24 THE COURT: -- Resolution.

25 MR. CHARLES: -- Corporation.

1 THE COURT: Does anybody contend that I can't go
2 forward on this motion because of that bankruptcy? I'm not
3 suggesting that I do or don't. I just want to know if anybody
4 contends that.

5 MR. HOWARD: Your Honor --

6 MR. CHARLES: We do --

7 MR. HOWARD: -- I'm Randolph Howard on behalf of
8 Asset Resolution, LLC, the debtor. My application to be
9 admitted as special counsel for Nevada has not been completed.
10 It is not before the Court. I am very tentative to give away
11 anything. I'm not authorized to speak for the debtor.

12 It strikes me that the debtor's claim is property of the
13 estate in the Southern District of New York, that it should all
14 other things being equal probably be litigated before you, and
15 that there's an automatic stay there. I'm not at liberty to
16 tell you much more about that bankruptcy case.

17 THE COURT: Okay. So I guess there is not a -- it's
18 really up to you, Mr. Charles, because, you now, the problem
19 with stay violations is nothing happens to me.

20 The problem is if somebody contends it's a stay violation,
21 and I'm not saying it is because it's so tangential on whether
22 or not it's property of the estate.

23 So it seems to me it's just up to you to decide whether or
24 not we're going to go forward because the point is I don't know
25 what the Second Circuit law is in this area.

1 MR. CHARLES: Right.

2 THE COURT: Secondly, if the Second Circuit law is
3 that somehow some claim the property of the debtor may have is
4 property of the estate and stayed even though it's the debtor
5 seeking the recovery and/or I don't know what the
6 Second Circuit law as to void or voidability is as to
7 lift-stays, either, so I'll just leave it to you.

8 MR. CHARLES: We're comfortable with proceeding.

9 THE COURT: Okay.

10 MR. CHARLES: I write the Norton Annual Survey on the
11 automatic stay, and I can't pretend to keep that in my
12 short-term memory.

13 But to my mind, this is just the same as plaintiff files a
14 bankruptcy petition. You know, the best that you can get out
15 of those kinds of cases is if there is a counterclaim against a
16 plaintiff that's a claim against the debtor under 362(a)(1).

17 But a claim by the debtor that the debtor can prosecute or
18 not is not protected by the stay, and Courts are free to
19 dispose of claims asserted by debtors.

20 THE COURT: Okay. And in any case, only one of the
21 movants or the objectors --

22 MR. CHARLES: Correct.

23 THE COURT: -- is in bankruptcy, correct?

24 MR. CHARLES: Correct. And I'm not familiar enough
25 with its corporate structure to know how exactly it's related

1 to --

2 THE COURT: Okay.

3 MR. CHARLES: -- the economic interest it asserts.

4 THE COURT: Okay. All right.

5 MR. CHARLES: So --

6 THE COURT: Go ahead.

7 MR. CHARLES: So just --

8 THE COURT: On the motion, then.

9 MR. CHARLES: -- real quickly, and I'll then let
10 Silar speak for its objection, and then I'll address their
11 objection, but let me kind of work you through the why did we
12 send out a gigantic notice to all the creditors kinds of
13 issues.

14 This is the first interim request for distribution
15 authority from the Court. It's clearly within your
16 postconfirmation jurisdiction.

17 Whatever else you might think about postconfirmation
18 jurisdiction, distributions to creditors are within that scope.
19 I know because there's because concern you'd also want to have
20 a sense of the dollars as opposed to the process.

21 And as a result of objections that either have been ruled
22 upon or are being ruled upon today, it's our understanding --
23 and let me just give you kind of a round number, a round number
24 round to the nearest million numbers.

25 About \$936,000,000 in claims were filed. As a result of

1 the process that has gone on to date, about 464,000,000 of
2 claims have been disallowed.

3 Another 80,000,000-ish were in various other baskets that
4 were disallowed because it has parts of multiple loans, and we
5 think that about 165,000,000 in claims should be allowed.

6 Part of this motion says here is a schedule. We want to
7 allow the claims the way this schedule says. And, for example,
8 there's a small claim of the Diversified Trust Deed Fund of
9 \$128,000,000 and the First Trust Deed Fund which is assigned to
10 DTDF of like \$7,000,000, so ish 135 of \$165,000,000 in claims
11 are represented here before you, but those are filed claims.

12 We then have unresolved claims which are primarily direct
13 lenders whose loans we have not decided what position to take
14 with respect to an objection or not or it hasn't been ruled
15 upon by the Court. The unresolved claims are rounded
16 \$226,000,000, so that's out of filed claims.

17 You'll also recall from the schedules amended and amended
18 and amended in the Commercial Mortgage case there were rounded
19 \$59,000,000 in scheduled claims.

20 The bulk of that is stolen principal in that \$38,000,000
21 range, and we end up with out of the process of scheduled and
22 filed claims a total of 181,000,000. So if this -- and we'll
23 true up the numbers after this hearing and after the order's
24 entered.

25 But in rounded numbers, we think there's \$181,000,000 of

1 allowed claims, and we have not yet resolved rounded
2 \$226,000,000 of claims, the vast bulk of which are direct
3 lenders.

4 So the first step of this motion says to you could we
5 please treat the claims that are set forth in the exhibit as
6 allowed and disallowed, and you would say, hey, tell me about
7 notice and due process.

8 A notice was sent to every lender on every loan that had a
9 little tear-sheet amount that said here is what we think your
10 claims were, here's what we think has been disallowed, here's
11 what we think should be allowed, and here are some that are
12 unresolved.

13 And we've gotten calls, and Mr. Berman gets the calls, I
14 do, and we answer every call. And in some respects, we've
15 actually agreed with claimants whose claims had been disallowed
16 earlier that there was a mistake made.

17 And we've asked to have some of those claims brought back
18 into the allowed pot. And in other circumstances, we've just
19 answered their questions. Obviously, no one is here before you
20 today.

21 So from the perspective of giving creditors, particularly,
22 the direct lenders, notice that here is how we think your
23 claims play out, we think we have given that notice.

24 We have some anecdotal evidence from the calls back that
25 that notice was received, and it was precisely designed to try

1 and tell them here is the claims you're talking about.

2 We're still getting calls. I got a very nice call from a
3 lady today. She's got \$1100, and why is it in this bucket or
4 that bucket, and a paralegal will call her back and answer that
5 questions.

6 So we think that you should be comfortable with the idea
7 of allowing the claims as requested, disallowing the claims
8 that you've already determined to be disallowed, and leaving
9 the other bucket as unresolved.

10 The second step, then, under the plan is how do you
11 distribute, and there are cases where they've gone through
12 complexities about how do you reserve for disputed claims.
13 This plan does not do that, and our proposal is we reserve for
14 every unresolved claim as if it were an allowed claim.

15 So instead of \$1 going out to a creditor out of the
16 \$20,000,000 pot, \$1 going to allowed claims, we're going to
17 hold back that \$1 if it's attributable to an unresolved claim.

18 So the math if you will between allowed and unresolved
19 claims is about 44-and-a-half percent of the pot appears to be
20 allowed and about 55-and-a-half percent of the pot appears to
21 be still unresolved.

22 And so DSI working with someone who's going to write a lot
23 of checks -- I think Mr. Berman is probably going to pass
24 writing checks this time, but, perhaps, I'm wrong -- would be
25 sending out interim distributions to the folks in the allowed

1 pot as long as the check is at least I think \$5. We're trying
2 to save transaction costs there, and so that to us is the
3 complex, but not contested part of this process.

4 And so, really, the question before you is the trustee
5 says he has \$20,000,000 available for distribution. That's
6 over what he reasonably estimates is necessary to fund the
7 Trust, including the ongoing litigation to try and recover the
8 balance of the assets.

9 And we have asked you for authority to distribute that
10 \$20,000,000. And as to that, Silar has objected, and what I
11 would do is turn it over to them to talk about their objection.

12 THE COURT: Okay.

13 (Colloquy not on the record.)

14 MR. HOWARD: Your Honor, Randolph Howard again
15 representing only Asset Resolution, LLC --

16 THE COURT: Oh --

17 MR. HOWARD: -- not either --

18 THE COURT: -- you don't represent Silar?

19 MR. HOWARD: We did when we filed the opposition, but
20 the interim filing of the Chapter 11 by Asset Resolution and
21 our pending application as special counsel I believe prevents
22 us from representing the two Silar entities --

23 THE COURT: But Silar --

24 MR. HOWARD: -- because --

25 THE COURT: I don't think Silar even filed.

1 MR. HOWARD: The opposition was filed for three
2 clients, your Honor.

3 THE COURT: Right.

4 MR. HOWARD: Silar, Silar Advisors, and
5 Asset Resolution.

6 THE COURT: But I didn't see Silar Advisors or
7 Silar Special Opportunities on that list. Were they? Does
8 anybody have that list with them?

9 MR. HOWARD: I'm sorry. What list?

10 THE COURT: The notice of filing.

11 MR. CHARLES: I think what Mr. Howard is saying is
12 Asset Resolution, the debtor, has elected to hire him, and so
13 he can't represent Silar, and your question is, well, then who
14 is representing Silar.

15 MR. HOWARD: And the answer is there's no one here
16 today representing Silar, your Honor.

17 THE COURT: Okay. All right.

18 MR. HOWARD: It --

19 THE COURT: So go ahead as to Asset Resolution, then,
20 I guess.

21 MR. HOWARD: It is our position that the filing of
22 our adversary complaint presents this Court with a
23 postconfirmation breach of the asset purchase agreement that we
24 believe is attributable, in part, to the Trust. That the Trust
25 has a responsibility for that to the entire extent of the

1 breach.

2 It would be, first off, I think distributing or affecting
3 an asset of the Asset Resolution Chapter 11 case, a
4 dually-scheduled asset, to distribute its portion of that fund
5 with prejudice to that claim.

6 And I believe it would be imprudent to tell the magnitude
7 of the claim has been at least determined to the satisfaction
8 of the trustee to go ahead and make a distribution faced with
9 that postconfirmation claim.

10 Your Honor, I don't believe that today's proceeding can go
11 forward not because of any automatic-stay issue, but only
12 because property of the Asset Resolution, LLC, Chapter 11 case
13 would be distributed or disposed of or made unavailable as a
14 result of any ruling distributing proceeds today.

15 THE COURT: Okay. Anything else? All right.

16 Thank you.

17 MR. CHARLES: You have read our reply, and so I'm not
18 going to regurgitate it for you, but let's start back with an
19 experience that you and I and Mr. Levinson and Mr. Tucker share
20 and Mr. Howard does not which is the auction with respect to
21 the servicing rights and the order confirming the plan.

22 And there are two things that are patent from that record
23 available to Mr. Howard or anyone else who wants to look at
24 that record.

25 One is the direct lenders were screaming like hell about

1 having their servicing rights transferred and, in particular,
2 because they didn't trust Compass, and they had concerns about
3 how servicing fees were going to be dealt with.

4 For that reason -- and we have quoted to you, for example,
5 from the plan -- there are explicit protections in the
6 documents that essentially reserve the issues of who is right
7 as between Compass and the direct lenders over a variety of
8 issues.

9 You'll recall there were the Section 3 termination rights,
10 and there were concerns about the waterfall, and all sorts of
11 concerns. Those were known. They are reserved in the
12 confirmation documents for another day.

13 When the order confirming the plan was affirmed -- and
14 we've cited this to you in our brief -- the district court
15 said, essentially, one of the reasons why I'm confirming the
16 plan over the direct-lenders' appeal and their objections is
17 you're not affected.

18 Your forum, your day, is in court with Compass somewhere
19 else, but that's not what is determined by the confirmation of
20 this plan.

21 The premise of the argument that Mr. Howard makes which is
22 that the trustee should reserve some amount for a claim by
23 Asset Resolution Corporation as the -- I don't know how --
24 successor to Compass is that we have a claim.

25 Where would you get a claim? You'd get a claim out of the

1 asset purchase agreement. You probably don't remember because
2 you weren't as amused by it as I was.

3 But you were pretty critical with some of the provisions
4 in the asset purchase agreement and added some very good
5 suggestions with respect to that document.

6 Well, one of the things that you can see when you read
7 it -- and it's again in this Court's record -- is there isn't a
8 darn thing that these folks can rely on that would be in the
9 nature of a representation or a warranty by Commercial Mortgage
10 that says here is how much money you're going to get out of the
11 servicing rights or here is some position as to the validity of
12 the servicing rights.

13 There is nothing like that in that asset purchase
14 agreement, and you know that from two reasons. One is read it.
15 You can't find it.

16 And the second reason is because the district court in the
17 order affirming the order confirming the plan said that's not
18 what's happened here.

19 We did not leverage the direct lenders through the asset
20 purchase agreement as approved by the order confirming the
21 plan.

22 Another way that I didn't realize until I reread their
23 objection today that you get that is the only provision in the
24 asset purchase agreement they cite is a provision in
25 Section 7.3 which they went -- if you read their response,

1 there's a little snip from Section 7.3 that they say that means
2 we were getting valuable servicing rights. You must have
3 breached your contract to get us there.

4 Well, 7.3 are in the covenants of purchaser. In other
5 words, in the Compass covenants, there is this language that
6 they say creates an obligation of Commercial Mortgage to sell
7 it which intuitively makes no sense.

8 And if you read the first sentence of the section that
9 they are stripping some language out of, it says, "Nothing
10 contained in this agreement shall modify the obligations owed
11 to the lender by the loan servicer or rights of the lenders
12 against the loan servicer or the rights of the loan servicer
13 against the lenders under the applicable servicing agreements
14 and otherwise applicable law."

15 So whatever that covenant's provision dealt with, it
16 certainly isn't the Commercial Mortgage representing a
17 warranting to Compass here is how much you're getting out of
18 selling servicing rights or here is how much or here is some
19 representation as to the nature and the quality of the
20 servicing rights. We did not know.

21 So at a substantive level, there isn't anything that
22 you could touch and say a basis for a breach of
23 contract.

24 At a procedural level, we point out that whatever this
25 claim is it appears to run square into the plan injunction

1 which essentially says you can't be taking actions against the
2 postconfirmation entities. And by suing the Trust, they run
3 clearly into Section 4(h) of the plan injunction.

4 It was suggested by Mr. Howard just now words to the
5 effect of it's not exactly clear how. But to some extent, the
6 Trust has some liability for the obligations of
7 Commercial Mortgage. In fact, that's not true, and the plan
8 and the confirmation order say exactly the opposite.

9 The Trust's obligations are under the plan to the
10 unsecured creditors as beneficiaries, so what do you have ARC
11 or Silar? You have at best an expense of administration.

12 Well, what should you have done with that? You should
13 have filed an expense of administration. What was the deadline
14 for that? 30 days after the effective date. It's in the order
15 confirming the plan.

16 And you'll remember Silar's counsel from New York,
17 George -- I'm blanking on his last name -- signed off on that
18 confirmation order. There was a deadline to file expenses of
19 administration. Did they do that in 2007? No. 2008? No.

20 Now, just before the \$20,000,000 is to be distributed,
21 whatever else is true, it's clear that this alleged
22 administrative expense is untimely because it does not fall
23 within the parameters of the confirmation order which also pick
24 up the plan as to the deadline to file expenses of
25 administration.

1 And the reason why that deadline is there is for just this
2 problem. We do not want a situation where someone says, well,
3 back in December before the plan was confirmed I signed an
4 agreement, and now I've decided two-and-a-half years later I
5 have a claim. It's too late. You could have made your claim,
6 and you chose not to.

7 Their argument that there was unjust enrichment flows I
8 think from a serious misreading of the asset purchase
9 agreement.

10 You are told in the objection Compass paid sellers
11 \$67,000,000 for these collective rights in an unallocated
12 Section 363 asset sale.

13 And if you keep it in your short-term memory which you
14 don't because you're a judge, and you're too busy, you know
15 that's just not true.

16 There was an FTDF portion of the purchase price for
17 \$48,000,000. There was a Commercial Mortgage portion for
18 \$8,000,000 which included the sale of interests in notes that
19 Commercial Mortgage had.

20 And there was an \$11,000,000 overbid that Mr. Merola and I
21 had a big fight about, and you eventually confirmed a
22 settlement where those were split between Commercial Mortgage
23 and the FTDF committee.

24 There is no claim against FTDF for the sale of
25 Commercial Mortgage servicing rights, but that's who they've

1 sued in their complaint along with the Trust.

2 And it makes no sense that whatever you'd estimate their
3 claim at which I would say on a substantive level and a
4 procedural level is zero that the numerator or the denominator
5 they're staring off with, \$67,000,000, is just wrong, and it's
6 pretty close to a misrepresentation to you with respect to the
7 nature of that agreement.

8 So for these reasons, the trustee did consider the
9 Asset Resolution Corporation and Silar objection, and he did
10 consider to what extent would it be prudent to reserve funds to
11 deal with this objection.

12 And our reaction is it would be prudent for whoever filed
13 this objection to consider their obligations under Rule 11, but
14 it is not necessary for the Trust to hold back money from the
15 beneficiaries who have not received a penny on their claims
16 since the Commercial Mortgage bankruptcy case was filed in
17 March of 2006. We'd ask that you approve the distribution.

18 THE COURT: Okay.

19 MR. HOWARD: Your Honor, if I might?

20 THE COURT: All right.

21 MR. HOWARD: Mr. Charles, notwithstanding his pointed
22 jab at me, has asked this Court, essentially, to prejudge our
23 complaint without a motion to dismiss, without the benefit of
24 briefing from our side. I don't believe that is the
25 appropriate function here --

1 THE COURT: Well --

2 MR. HOWARD: -- today.

3 THE COURT: -- but you're asking for a verdict in
4 your favor without even filing a preliminary injunction.

5 MR. HOWARD: I'm not asking for anything other than
6 that this Court decide the matter in a measured, timely matter
7 and give due deference to the procedures inherent to someone
8 who came to this court with \$67,000,000 and handed it to a
9 Chapter 11 debtor to buy assets.

10 Now, we're asking this Court to review that contract to
11 see if we have the damage claims we think we have. Contrary to
12 what I understood Mr. Charles to say, the asset purchase
13 agreement says the total asset purchase price shall be valid
14 only with regard to all assets as a whole. It is not separable
15 to any extent.

16 I don't know that we can tell you what our measure of
17 damages is today exactly, but I'll tell you that we have a
18 schedule that was put together by the chief restructuring
19 officer and the purchaser to reflect adjustments in the various
20 assets and modify the asset purchase agreement dated
21 December 8th, 2006, that includes liquidated sums due for
22 servicing fees as of accrual through 10/31/2006.

23 For example, one of those, the total outstanding
24 postpetition servicing fee and only servicing fee, not the
25 waterfall issue, the other issues, or any of those, is \$257,000

1 relating to property that's commonly known as the Gess
2 property. We recently received only 90-some-thousand dollars
3 in payment on that.

4 Our point is we didn't get what we paid for. We'd like to
5 have this Court adjudicate how much we are entitled to receive
6 by way of compensation for that breach of contract.

7 We believe the breach-of-contract claim reaches into the
8 hands of the current trust, and I'd ask this Court merely to
9 defer the distribution.

10 Don't make it unavailable until you've had a chance to
11 look at this and deal with it in a measured manner as this
12 Court deals with everything else.

13 I think the Dean versus TWA case suggests -- at least my
14 reading of it infers -- that this Court should wait before
15 taking any action to recognize comity of the pending matter in
16 the Southern District of New York and shouldn't take action
17 without further agreement, leave of that Court, to make binding
18 decisions that would deal with that.

19 THE COURT: But didn't Compass file an action for
20 breach of contract which was dismissed?

21 MR. HOWARD: There was an action filed by Compass for
22 rescission of the asset purchase agreement that was dismissed,
23 your Honor --

24 THE COURT: Right. Okay.

25 MR. HOWARD: -- not for a breach of the contract.

1 THE COURT: But it was dismissed.

2 MR. HOWARD: It was dismissed, your Honor.

3 THE COURT: And it's based on the same facts.

4 (Colloquy not on the record.)

5 MR. HOWARD: I don't believe so. The facts relating
6 to this present complaint weren't in existence as of the date
7 of the dismissal.

8 THE COURT: And isn't the only reason you didn't get
9 the Gess payments because Judge Jones ruled that by virtue of
10 the contract you weren't entitled to them?

11 MR. HOWARD: And I'm not arguing with Judge Jones,
12 and I don't know --

13 THE COURT: But that's the reason --

14 MR. HOWARD: I --

15 THE COURT: -- you didn't get --

16 MR. HOWARD: I --

17 THE COURT: -- the --

18 MR. HOWARD: I wasn't --

19 THE COURT: -- Gess payments.

20 MR. HOWARD: I wasn't there.

21 THE COURT: Okay.

22 MR. HOWARD: All I'm saying is the schedule of assets
23 purchased by this Court said we had a \$257,000 servicing fee on
24 the Gess property, and Judge Jones ruled we had a \$90,000.

25 THE COURT: Right. But no contract. There was never

1 a contract that said that.

2 MR. HOWARD: Oh, I believe quite clearly, your Honor,
3 that the document I'm referring to -- and it's hard to do this
4 piecemeal.

5 THE COURT: Not the asset purchase agreement.

6 MR. HOWARD: It's a modification of the asset
7 purchase agreement that I believe is binding on all of the
8 parties to the asset purchase agreement and part of --

9 THE COURT: But Judge Jones ruled you weren't
10 entitled to that, correct?

11 (Colloquy not on the record.)

12 THE COURT: That's why you're claiming you weren't --

13 MR. HOWARD: I'm not certain that Judge Jones ruled
14 that we were not entitled to it as opposed to it wasn't
15 available. There was only \$8,000,000.

16 And for whatever reason, he awarded not the contractual
17 sum, but some other sum. And since I wasn't there, I really
18 can't --

19 THE COURT: Okay.

20 MS. WINDLER: Your Honor, it's Katherine Windler. I
21 was at that hearing if the Court would like to hear that.

22 THE COURT: So he ruled, basically, that you weren't
23 entitled to it under his contract interpretation.

24 MS. WINDLER: I believe that's not correct.

25 THE COURT: Okay.

1 MS. WINDLER: I believe Mr. -- or excuse me.

2 Judge Jones said on numerous occasions that he was going to
3 make a ruling on Gess.

4 But that he would withhold a final adjudication because he
5 wasn't sure whether or not Compass and its successors were
6 entitled to them.

7 And that his rulings would be subject to a revision. It
8 would be subject to an accomodation at trial. It would be
9 subject --

10 THE COURT: Well, then how --

11 MS. WINDLER: -- to setoffs.

12 THE COURT: -- do we have a breach of contract if he
13 hasn't decided you're not entitled to it?

14 MS. WINDLER: The essence of the breach of contract
15 in my mind is this. The trustee by virtue of the asset
16 purchase agreement and the trustee's operating documents which,
17 presumably, Mr. Berman signed when he agreed to take on the
18 duties of a trustee said we will deliver to you, the buyer, A,
19 B, and C.

20 The direct lenders are now taking the position in the
21 district court litigation that the buyer is not entitled to A,
22 B, and C. The buyer is only entitled to A.

23 With respect to at least one property and potentially
24 others, Judge Jones has said as to this property right now
25 subject to later offsets if I'm wrong -- and on multiple

1 occasions, he said I might be wrong, and I don't know if I'm
2 right because I haven't heard all the evidence.

3 But on this property, all I'm going to give you is this
4 because I don't think that the trustee delivered you B and C.
5 That's not what Judge Riegler's order says.

6 So if, in fact, the seller which here was the debtor who
7 then subsequently became the trustee, and the trustee took on
8 those obligations under the asset purchase agreement and the
9 plan-confirmation order as well as the obligations he took on
10 under his trust, if they, in fact, failed to deliver those
11 items which it appears to be now the ruling or shortly will be
12 the ruling of Judge Jones, it becomes imperative that at that
13 moment we prevent any loss of the potential correct
14 distribution of assets, not stop it forever, but at least delay
15 it until a point in time when the parties can sit down and
16 determine precisely what that is.

17 And it is clear that no one on the Trust's side of the
18 equation has spoken to us about the claim. We didn't file an
19 administrative claim under the bar date because a bar date for
20 an administrative claim is precisely that. It's a claim that
21 arises postpetition, preconfirmation.

22 We're not asserting a postpetition of USA preconfirmation
23 claim. The claim arose at the time of the delivery of the
24 assets and was simply brought more to light.

25 We're not arguing that there was a guarantee as to what

1 those assets would be worth or what the nature of those would
2 be or what value would later be put onto those assets.

3 The argument is that this Court and this Court's ruling
4 and the postconfirmation order says, specifically, we will
5 deliver you these assets.

6 Judge Jones has now said you do not have those assets;
7 therefore, we come back to seeing we probably have a claim
8 against the Trust.

9 And if, in fact, the Trust failed to deliver them, then
10 the Trust would pay the damages related to that failure to
11 deliver which is in the asset purchase agreement. Mr. Howard
12 has it.

13 THE COURT: But the Trust --

14 MS. WINDLER: No. The other one.

15 THE COURT: -- never has attempted to take any
16 servicing the Trust -- and I know the answer to this, but I
17 want it clear for the record.

18 The Trust has no part in that litigation, correct? The
19 litigating trust has never argued in any manner against your
20 rights to any funds in that litigation that's going on. It's
21 all with the direct lenders, correct?

22 MS. WINDLER: I can't answer that correct for this
23 reason. I think you're basically right, but the reason I can't
24 that is because there have been issues with respect to the
25 prepaid-interest rights that the Trust held.

1 And those prepaid-interest rights have come before
2 Judge Jones, and so the Trust's right to collect those has been
3 before that Court.

4 THE COURT: But as far as --

5 MS. WINDLER: So --

6 THE COURT: -- anyone, quote, "preventing" you from
7 getting the funds or receiving the assets, the Trust has had no
8 part of that, correct?

9 MS. WINDLER: I --

10 THE COURT: It's all the direct lenders are
11 contending that the contracts don't say what you say they said,
12 right?

13 MS. WINDLER: That's not correct. The Trust and the
14 trustees may not have taken an affirmative --

15 THE COURT: They're not parties --

16 MS. WINDLER: -- open --

17 THE COURT: -- to --

18 MS. WINDLER: -- step --

19 THE COURT: -- that litigation, right?

20 MS. WINDLER: -- that is correct --

21 THE COURT: Okay.

22 MS. WINDLER: -- to try to prevent those assets from
23 being there.

24 But the asset purchase agreement clearly says in
25 paragraph 3.4 that the mortgage notes and the mortgages and

1 other legal documents in connection with the plan are valid and
2 binding obligations.

3 And then you go to the breach section which is 8.2 which
4 lays out remedies for a breach only if it occurs preclosing,
5 and that's what Compass brought.

6 What Compass brought when they said we want to rescind
7 under 8.2, Subsection C is a right to rescind or terminate the
8 agreement under certain circumstances.

9 But the facts under which they moved have nothing to do
10 with the facts under which we have moved. Our position --

11 THE COURT: And you've been in this litigation for
12 three years now, right? And you're just now bringing this
13 motion or you just now filed the new complaint.

14 MS. WINDLER: I believe. I personally was not, but I
15 do believe that Compass was in the litigation, and Silar was in
16 the litigation from May of '07, and Asset Resolution moved to
17 intervene in that which was held at a hearing in March of 2009.

18 THE COURT: Right. But they're all related to Silar.
19 They're all the same people because that's what you've been
20 telling me today that these people are all related.

21 MS. WINDLER: Well, Asset Resolution was set up as a
22 special-purpose entity to conduct the foreclosure which is a
23 very common way of foreclosing on assets when a secured lender
24 forecloses on a particular pool of assets.

25 THE COURT: Okay.

1 MS. WINDLER: And --

2 THE COURT: So they have been involved. You've been
3 involved for two-and-a-half years, and this lawsuit was just
4 now filed right after the distribution motion was filed.

5 MS. WINDLER: The filing of this complaint was not
6 based on the filing of the distribution. It was based on the
7 ruling of Judge Jones that we did not receive or purchase what
8 the confirmation order says we purchased.

9 THE COURT: Okay. All right. Thank you.

10 (Colloquy not on the record.)

11 MR. CHARLES: If you are troubled by the language of
12 the asset purchase agreement, it's filed at Docket 2164.

13 THE COURT: Hold on a second.

14 MR. CHARLES: There was the notice of filing the
15 Compass asset purchase agreement. Exhibit A is part 1 of that.
16 Exhibit B is part 2.

17 THE COURT: I should know this. Oh, there it is. I
18 should have this case number down by memory now, but --

19 MR. CHARLES: 06- --

20 THE COURT: 25.

21 MR. CHARLES: -- 10725.

22 THE COURT: And docket number what?

23 MR. CHARLES: 2164.

24 THE COURT: 64.

25 MR. CHARLES: It's the first exhibit.

1 THE COURT: I looked at it earlier today, but I
2 didn't bring it out with me.

3 (Colloquy not on the record.)

4 MR. HOWARD: Rob --

5 THE COURT: Oops.

6 MR. HOWARD: -- is that the December 8th version?

7 MR. CHARLES: This is the version, the only version,
8 that's been filed with the court.

9 MR. HOWARD: There was several attached plans.

10 MR. CHARLES: And this is the Compass asset purchase
11 agreement dated December 8, 2006.

12 MR. HOWARD: Thank you.

13 MR. CHARLES: You're welcome, Counsel.

14 And I apologize for taking your time on the bench. You're
15 probably going to want us -- but if I could just give you sort
16 of the road map, so you can look at it.

17 THE COURT: 2164. Here we go. I've got it.

18 MR. CHARLES: Yes, ma'am.

19 THE COURT: Exhibit A or the agreement?

20 MR. CHARLES: The first. There are two exhibits.

21 THE COURT: Uh-huh.

22 MR. CHARLES: And the first one is the first half
23 of --

24 THE COURT: Exhibit A?

25 MR. CHARLES: Yes, ma'am.

1 THE COURT: Okay.

2 MR. CHARLES: And if you then go into -- what counsel
3 was just referring you to starts in Article 3, Statements of
4 USACM, on page 12.

5 THE COURT: Okay. Okay.

6 MR. CHARLES: These are the reps and warranties --

7 THE COURT: Um-h'm.

8 MR. CHARLES: -- of USACM.

9 THE COURT: Okay.

10 MR. CHARLES: And what she was particularly referring
11 to is on the next page, Statements Regarding the Assets.

12 THE COURT: Right. Got it.

13 MR. CHARLES: And, for example --

14 THE COURT: Oh, closing-condition statements.

15 MR. CHARLES: Absolutely. And so they're either
16 statements up to or through the closing condition. They're
17 certainly not after.

18 And, for example, B is the outstanding principal balance
19 with regard to each of the loans. That's the pieces of
20 interests in loans that Commercial Mortgage was selling. Those
21 are represented, and they are scheduled.

22 There is no representation, and there is no schedule
23 that says we're giving you this many dollars of servicing
24 rights.

25 And if you are interested in comparing how this agreement

1 treated different pieces of the puzzle -- it is true,
2 Mr. Howard, that there is no allocation agreed to by Compass.

3 But if you'd go back to Section 2.2, Purchase Price, which
4 is a little bit above what you're looking at --

5 THE COURT: Right.

6 MR. CHARLES: -- look at how the agreement allocates
7 the purchase price for the debtors, and that's where we get the
8 48,000,000 for First Trust Deed Fund. If you --

9 THE COURT: Right.

10 MR. CHARLES: There is a schedule for First Trust
11 Deed Fund. And if the numbers are wrong as the amounts change
12 for First Trust Deed Fund, there are amounts that change --
13 excuse me -- change in the purchase price.

14 Look at one more thing because counsel just said something
15 that I thought was amazing. Look if you would, please, at 8.2
16 which is their remedies provision which was -- this is going to
17 be my summary-judgment motion. But as long as we've brought it
18 up, what the heck --

19 THE COURT: Right.

20 MR. CHARLES: -- let's talk about it.

21 This is the remedies for a breach by sellers is 8.2, so
22 Commercial Mortgage and FTDF are the sellers, and you'll see
23 this is an exclusive-remedies provision.

24 It essentially says if there is a breach you can close,
25 you can proceed for a specific performance, or you can

1 terminate, and those are your remedies.

2 Now, the argument is, well, those are only for preclosing
3 breaches. If we didn't know there was a breach, then the
4 exclusive-remedies provision won't apply, and I guess we're
5 going to have to brief that.

6 But to me, it's very interesting that they are now looking
7 at their exclusive-remedies provision which doesn't allow for a
8 breach-of-contract provision, and they're trying to argue their
9 way around it.

10 But the last thing that counsel said, it's incredibly
11 important to sit back and look at the parties. You're told the
12 trustee agreed to do certain things in terms of deliveries.
13 That is not true.

14 This agreement closed in February of 2007 when
15 Commercial Mortgage is the seller, and the documents that they
16 have that are signed are signed by Mr. Allison on behalf of
17 Commercial Mortgage.

18 The Trust comes into effect in March of 2007 on the
19 effective date of the plan. Mr. Berman did not sign anything.
20 He did not deliver anything. This was a closed transaction
21 when it was brought to the Trust.

22 And the proposition that the Trust is liable for this
23 alleged liability of Commercial Mortgage just makes no sense to
24 me at all.

25 So, again, with respect -- and I guess maybe last -- I

1 never thought we'd get this far. But if they're asking you to
2 enjoin a transfer of \$20,000,000 -- and we are told by
3 Mr. Howard you should follow the procedures for like a
4 preliminary injunction -- one of those procedures ordinarily
5 would be security, and I am sure the unsecured creditors would
6 like to see a substantial security if you were at all inclined.

7 There is, of course, no offer of any of that. There's no
8 effort made to talk about any prejudgment remedy under Nevada
9 law or federal law. There is no procedure being followed here
10 except please hold up a distribution, and we just think that's
11 not appropriate.

12 THE COURT: Okay. Thank you.

13 MR. LEVINSON: Marc Levinson for Diversified. I want
14 to address the merits, but I did want to talk to your timing
15 issue because that's very important to us.

16 Your Honor knows from having presided over this case for
17 so long that the Diversified investors, all 1200 of them who
18 invested \$150,000,000, were the primary victims of this whole
19 scheme.

20 So far to date, we have distributed \$13,000,000 on total
21 claims of 150. And not even counting the lost value of money,
22 we have distributed about 8.7 percent.

23 Finally, the Trust has made this distribution. We're
24 thankful that it did. Diamond McCarthy and Mr. Berman and
25 Mr. Charles' firm have done a great job in collecting assets.

1 Our share of this would be at least \$5,000,000. We are
2 one third of the total claims in this case today counting the
3 unallowed or the claims that have not yet been allowed as still
4 up in the air.

5 Of the allowed claims, we're 75 percent of the allowed
6 claims. We are, in part, the net beneficiaries of this. This
7 distribution to us would be at least \$5,000,000.

8 It would be another 3.34 percent which would get us up to
9 a total of still only 12 percent which is significantly lower
10 than any of the other investors in this case.

11 Compass bought this property and closed the deal as we've
12 heard two-and-a-half years ago and has sat on its rights ever
13 since then.

14 At this last minute to come in now and ask that the
15 Diversified investors and the other creditors, unsecured
16 creditors, of this estate who haven't been paid anything since
17 the filing of the case, and that includes the people, remember,
18 whose moneys was stolen, the stolen principal, seems to me to
19 be just outrageous at this point in time, so we would ask that
20 you approve the distribution.

21 THE COURT: Okay. Ms. Chubb, you look like you're
22 anxious to --

23 (Colloquy not on the record.)

24 THE COURT: -- since I know you're very much involved
25 in the federal court litigation.

1 MS. CHUBB: Well, I have been here for a long time,
2 and I think what's happening here is that as you may recall I
3 think it was I who at one point stood up and said, your Honor,
4 if all they're buying is whatever USA had can we put that in
5 the order, and it got in the order, and there are a lot of
6 other things that got said in there, but that was the bottom
7 line.

8 And now that Judge Jones has interpreted the
9 loan-servicing agreements, and they're not happy with that,
10 they want to contend that they should have gotten what they
11 thought they were getting or what they hoped they would get,
12 but they didn't.

13 So they want to stay the distribution, but that just
14 doesn't make any sense because they bought what they bought,
15 and we all know that.

16 And if Judge Jones who is the only person who has
17 interpreted the LSAs at this point says they don't get
18 something, they don't get it, and they can't get it some other
19 way by coming here and asking you to stay the distribution.

20 THE COURT: And let me make it clear again for the
21 record. The litigation trust is not a party to that litigation
22 whatsoever. They have done nothing --

23 MS. CHUBB: That's --

24 THE COURT: -- in that court to stop, halt, whatever,
25 do anything with respect to the distributions, correct?

1 MS. CHUBB: That's correct.

2 THE COURT: Okay.

3 MS. CHUBB: They've missed out on all that fun.

4 THE COURT: Okay.

5 MS. CHUBB: Yeah.

6 THE COURT: All right. Well, I'm going to grant
7 the motion for a distribution. Let me make my findings
8 orally.

9 First, we have the big problem that procedurally you can't
10 just move to stop a distribution. It would have to be brought
11 by a motion for a temporary restraining order or a preliminary
12 injunction, but let's get over that procedural difficulty for a
13 moment, and let's look at the merits.

14 Basically, the objectors are asking me to second-guess and
15 collaterally attack Judge Jones' ruling. One of two things
16 happened. Either we don't have a breach of contract, yet,
17 because he hasn't finally decided or if he has decided all he
18 has done is interpreted the contracts.

19 And, Mr. Howard, you don't share in the knowledge that all
20 of us have had about it was quite clear -- and that was part of
21 the appeal -- that all Compass got was whatever rights, so it
22 was almost like a quitclaim.

23 Whatever rights the debtors had in it -- excuse me -- the
24 debtors had to those servicing agreements, USA Commercial
25 Mortgage had, that's what Compass bought was basically it.

1 Secondly, with respect to the representations and
2 warranties, I don't see -- they did deliver the documents to
3 you. You got delivered everything they had.

4 The fact that Judge Jones has interpreted that to
5 mean something than you thought was different is not a
6 breach.

7 Secondly, I find it highly unlikely that you would have
8 any remedy. Section 8.2 appears to limit all your remedies to
9 -- there are no remedies now based upon the remedy section.

10 Compass was fully aware of these issues before you
11 actually closed because they were brought up at the various
12 hearings we had. There was even a discussion on the record
13 about the rights to terminate and not terminate.

14 I also find it's too late. I think you suffer from
15 laches. Also, there's been no showing whatsoever that these
16 objectors had rights to these funds.

17 I mean, you just say that they're the servicers now, but
18 we don't even know for sure who was or was not supposed to be
19 the servicer.

20 I will presume for the moment that you did inherit the
21 rights to Compass. I'll make that assumption, but that's not
22 showing in your pleadings, but I will make that assumption.

23 But, more importantly, there is nothing that shows that
24 this would be an obligation that would run against the Trust.
25 The Trust did none of these things.

1 There is no breach of contract by the Trust. It's merely
2 the separate entity that's in charge of disbursing the funds
3 that it has collected.

4 So I find that any kind of likelihood of success is slim
5 to nil, and that no funds should be set aside for the
6 disbursement, and that the trustee may disburse the funds, and
7 those are my oral findings and conclusions.

8 I also find I have subject-matter jurisdiction because
9 this clearly affects the implementation of the plan. The
10 objection I could rule on because it affects the distribution.

11 They have brought a complaint here, although they have not
12 sued on that complaint in this objection. All right. So thank
13 you on that, and we need to have a -- we have a few other
14 matters.

15 MR. HOWARD: Your Honor --

16 THE COURT: Um-h'm.

17 MR. HOWARD: -- just briefly. I'm not arguing, but
18 will you prefer that we bring on any application for a TRO, a
19 preliminary injunction? If not, I'm fine with that part of the
20 ruling. But if that's --

21 THE COURT: No. I'm --

22 MR. HOWARD: -- the --

23 THE COURT: I find too -- I'll do it in the
24 alternative.

25 MR. HOWARD: Okay. Thank you.

1 THE COURT: I'm not going to make it on the
2 procedural grounds. I'm going to go to the merits as well to
3 save you that effort, quiet frankly.

4 (Colloquy not on the record.)

5 MR. HOWARD: And the comments this Court made with
6 respect to our complaint, are they without prejudice to hearing
7 the matter on motion to dismiss, perhaps --

8 THE COURT: I mean --

9 MR. HOWARD: -- (indiscernible)?

10 THE COURT: -- you know, it's a separate motion. I'm
11 ruling on the distribution. I've told you what my thinking is
12 this way.

13 If I were to assume this was preliminary injunction -- so
14 it's true. I mean, anytime, it -- if you had brought it as a
15 preliminary injunction, I could rule this way, and then, later,
16 you could convince me to the contrary just like any motion for
17 a preliminary injunction would be, so, no, it's not.

18 It's, obviously, without prejudice to the merits of your
19 complaint. You've obviously had the benefit of my thinking
20 now. I don't know how the law's going to change, but it's
21 without prejudice, obviously. All right.

22 Thank you.

23 MR. HOWARD: Thank you --

24 THE COURT: Mr. --

25 MR. HOWARD: -- your Honor.

1 THE COURT: Before we go to the USA Investment
2 Partners, Mr. Hinderaker, are you still on? Do you want to get
3 back to those claims, so we can finish that up?

4 MR. HINDERAKER: Yes, your Honor, I am, and I have
5 been through them. First, I want to apologize for these errors
6 today.

7 They were sort of a systemic issue that arose because we
8 had some new people working on these, and I think we've looked
9 into that and corrected it, and, again, I'm sorry for this, but
10 there was six items that you pointed out --

11 THE COURT: Now, let me go first --

12 MR. HINDERAKER: -- on the --

13 THE COURT: -- to the 8th omnibus.

14 MR. HINDERAKER: Yes. On the 8th omnibus, I went
15 back. We did not file a notice of errata on this one, but you
16 are correct that the notice was filed a second time, instead of
17 the exhibits, so there is I think two ways, perhaps, we could
18 handle this.

19 One would be for me to go back and confirm that the
20 mailing was done properly and provide you with confirmation of
21 that.

22 In which case, I think you could sustain this objection or
23 I could just refile it and have it heard at a future omnibus
24 hearing.

25 THE COURT: How many -- I'm just concerned about

1 delaying distributions. How would this affect delaying
2 distributions?

3 MR. HINDERAKER: I think we could file the notice.
4 And if your Honor could grant or sustain the objection once
5 we've filed the notice confirming that or the notice of errata
6 confirming that the notice was correct --

7 THE COURT: Okay.

8 MR. HINDERAKER: -- then it shouldn't delay --

9 THE COURT: Okay.

10 MR. HINDERAKER: -- the distribution.

11 THE COURT: So you're sure it was sent. It's just
12 that the notice wasn't uploaded.

13 MR. HINDERAKER: That's right.

14 THE COURT: Okay. All right. So I'll sustain those
15 objections.

16 And then as to No. 17 on my calendar, the 10th objection.

17 MR. HINDERAKER: Yes. That's the same situation as
18 the 8th.

19 THE COURT: Okay. So those are sustained.

20 And the 13th, No. 20 on my calendar.

21 MR. HINDERAKER: Yes. We did file a notice of errata
22 on that one demonstrating that proper notice was given.

23 THE COURT: All right. That's sustained.

24 And No. 24.

25 MR. HINDERAKER: No. 24, again --

1 THE COURT: That's 17th --

2 MR. HINDERAKER: -- we did not catch --

3 THE COURT: -- omnibus objection.

4 MR. HINDERAKER: -- this one, so we did not file a
5 notice of errata, but it's the same situation where I believe
6 the proper notice was given.

7 THE COURT: All right. So that's No. 24 on my
8 calendar, the 17th objection.

9 And was that all?

10 THE CLERK: That was it, your Honor.

11 THE COURT: Okay. Thank you. All right.

12 Next, we'll go to USA, and anybody that -- USA Investment
13 Partners, and anyone who wants to just leave that -- wants to
14 leave certainly may. I won't take a recess because we all have
15 places we have to be, so I'll just go straight through.

16 The objection to claim of Chris Pederson and
17 Kevin Everett.

18 MS. GRAY: Thank you, your Honor. Talitha Gray on
19 behalf of Lisa Poulin, the Chapter 11 Trustee. This was a
20 continued claim objection.

21 Mr. Everett had contacted me the night before the prior
22 hearing and had asked for an extension in order to retain
23 counsel and to file a response. He has not filed a response.

24 We've actually received -- there's been no subsequent
25 communication regarding this, so we'd ask that the objection be

1 sustained.

2 THE COURT: All right. Anyone here? Are
3 Chris Pederson or Kevin Everett here? All right.

4 The objection's sustained.

5 Next, we have a settlement, 09-1121.

6 MS. GRAY: Your Honor, this is a very small matter.
7 It was \$6,508. A complaint was filed. No additional work's
8 been done on the matter at all. We settled it for \$4,000
9 immediately after filing the complaint.

10 THE COURT: All right. So that's approved. I find
11 it meets the A&C Properties test.

12 Let me skip the motion to dismiss for a moment.

13 No. 41 is in the Hantges matter, the Trust Fund versus
14 Hantges. We've got the Trust Fund and the Trust and Kehl
15 versus Hantges, a status hearing.

16 MR. LODEN: Yes, your Honor. Steve Loden on the
17 phone on behalf of the Liquidating Trust.

18 MR. LEVINSON: Marc Levinson for Diversified.

19 MR. FARRINGTON: Jason Farrington on behalf of
20 Tom Hantges.

21 MR. BEATTY: Max Beatty also on behalf of the Trust,
22 your Honor.

23 MS. CHUBB: Janet Chubb for certain lenders.

24 THE COURT: All right. Let's see. Is this case
25 converted? No. Are we still an 11?

1 MR. LEVINSON: No. That's what --

2 THE COURT: That's --

3 MR. LEVINSON: That's what we're here --

4 THE COURT: -- our problem --

5 MR. LEVINSON: -- to talk about.

6 THE COURT: -- right?

7 MS. CHUBB: Yeah.

8 MR. LEVINSON: Exactly.

9 MS. CHUBB: It is.

10 THE COURT: And Mr. --

11 MR. CARMEL: Good afternoon again, your Honor.

12 Michael Carmel, the Chapter 11 Trustee. We've decided that the
13 best way to go at this time is to convert the case to a
14 Chapter 7.

15 There will be a motion that's going to filed. I've
16 discussed this with Mr. Landis, and I believe that -- as well
17 as with Mr. Berman and Mr. Levinson.

18 I believe that what's going to be occurring is is that the
19 U.S. Trustee's Office if they go through the proper processes
20 will propose that I continue on as the Chapter 7 Trustee.

21 THE COURT: Okay. So should we continue this out?
22 Well, you're going to get that done, what, in the next month or
23 so? The next week, I hope.

24 MR. CARMEL: Ms. Itkin is on the line, but I believe
25 that within the next week there will be a motion that will be

1 filed. It's --

2 THE COURT: Okay.

3 MR. CARMEL: It's a pretty simple motion.

4 MR. DIAMOND: Allan Diamond for --

5 MS. ITKIN: Yes, your Honor.

6 THE COURT: Sorry. Go ahead and make your
7 appearance.

8 MS. ITKIN: Hi. It's Robbin Itkin,
9 Steptoe & Johnson, on behalf of Michael Carmel, the
10 Chapter 11 Trustee. Yes. If everyone's in agreement with what
11 we plan to do, we will get a motion on file very quickly.

12 THE COURT: Okay.

13 MR. DIAMOND: Yeah. And Allan Diamond on behalf of
14 Mr. Carmel, your Honor. As far as the 523 actions, what we
15 would propose in light of the conversion motion that's about to
16 filed is just to carry this one last time.

17 And then it will be the starting of a new running of the
18 clock with respect to any 523 actions. We all can figure out
19 how that's going to work in the context of a 7.

20 THE COURT: Okay. Do you want to put this on for the
21 November 13th date? Will you be able to get your -- I'll give
22 you an order shortening time if you want to put your motion on
23 for November 13th assuming you can get it filed this week or
24 the first of next week.

25 MS. ITKIN: Yeah. Just, h'mm, because of people

1 being out for the conference, that may be a little difficult.
2 We could file it next week. That would be easier I think,
3 your Honor.

4 THE COURT: Let's see.

5 MS. ITKIN: We're also hoping that this will resolve
6 the appeal that's been filed by Mr. Hantges. We --

7 THE COURT: Oh, right.

8 MS. ITKIN: You know, we do feel now it is ripe for
9 the conversion in light of the settlement that's been approved
10 by this Court, and we're hoping.

11 I don't know which counsel is there for Mr. Hantges, but
12 we would like to, hopefully, resolve that appeal in light of
13 the conversion.

14 THE COURT: Okay. Well, let's see. That would you
15 give you three-weeks' notice. If you filed it Monday, then it
16 would be one, two, almost three weeks.

17 Do you think that's sufficient notice to everybody on the
18 conversion motion? It sounds like everybody's is in
19 agreement.

20 MR. CARMEL: I would think that it is, your Honor.

21 THE COURT: Okay.

22 MR. CARMEL: What time is that hearing --

23 THE COURT: Our --

24 MR. CARMEL: -- on the 15th?

25 THE COURT: And you can appear telephonically if

1 you'd like.

2 MR. CARMEL: Thank you.

3 THE COURT: We have 9:30 that day.

4 MR. CARMEL: Appearing telephonically would be
5 appreciated, Judge.

6 THE COURT: That's fine.

7 MS. ITKIN: Thank you, your Honor.

8 THE COURT: Thank you.

9 MR. CARMEL: Thanks, your Honor.

10 THE COURT: Okay. All right. So the only matter --

11 MR. LODEN: Thank you, your Honor.

12 THE COURT: Sorry.

13 MR. CARMEL: Yeah. I don't know. I didn't see on
14 the calendar, Judge, that was posted, but I seem to believe
15 that there was an adversary that was filed that was initiated
16 on my behalf by the Diamond McCarthy firm.

17 I think that it's 09-1164 that was set for a status
18 hearing today as well. It's a lawsuit that I filed against
19 Mr. Hantges for a turnover of items that he may have taken.

20 THE COURT: Oh, right. We had a motion on that, and
21 I denied it.

22 MR. CARMEL: Correct. And they did file an answer.

23 THE COURT: Oh, it's not letting me in.

24 (Colloquy not on the record.)

25 MR. CARMEL: And I could bring the Court up to date

1 as soon as you have that up on your screen.

2 THE COURT: It's not letting me in.

3 Will it let you in, Darla?

4 THE CLERK: (Indiscernible) settlement conference is
5 set for --

6 THE COURT: Oh, here it is.

7 THE CLERK: -- October 28th.

8 THE COURT: So let's move that. Probably, what
9 happened was they didn't ask for a -- that's not an omnibus
10 day, is it?

11 THE CLERK: No, it's not.

12 THE COURT: It got stuck on a -- isn't the up-front
13 supposed to fix that or how does it get done? When you file a
14 complaint with these, you're supposed to ask for a specific
15 omnibus day.

16 THE CLERK: Well, that's the problem that a lot of
17 the newer people aren't aware of how many cases are related to
18 this case.

19 THE COURT: Oh, okay.

20 THE CLERK: (Indiscernible).

21 THE COURT: So we'll move that to the 30th or do you
22 want the 13th?

23 MR. CARMEL: Judge, the 13th. As long as we're going
24 to be on the phone at that time --

25 THE COURT: Sure.

1 MR. CARMEL: -- I think that that would be good, and
2 I'll take the responsibility of contacting Mr. Cory who
3 filed --

4 THE COURT: Great. Thank you --

5 MR. CARMEL: -- the answer.

6 THE COURT: -- very much. Well, his partner is here.

7 MR. CARMEL: And --

8 THE COURT: So --

9 MR. CARMEL: And just so the Court is aware, I don't
10 know if this would be the proper time of that. I would like to
11 be able to substitute in as my own counsel in that case and
12 discuss that with the Court on the record, you know, at some
13 point. I just think that it's unfair to ask, you know, these
14 lawyers to continue to work for nothing, and it's --

15 THE COURT: No. We can talk about the U.S. Trustee
16 is the one that has --

17 MR. CARMEL: That --

18 THE COURT: -- the biggest say in that as far as I'm
19 concerned, so --

20 MR. CARMEL: That issue has been discussed with
21 Mr. Landis.

22 THE COURT: Okay.

23 MR. CARMEL: And --

24 THE COURT: So sure. We can bring that on then if
25 you just want to do a substitution if that's what you decide --

1 MR. CARMEL: Okay.

2 THE COURT: -- to do.

3 MR. CARMEL: Thank you very much, Judge.

4 THE COURT: All right. Thank you.

5 THE CLERK: Your Honor --

6 MR. DIAMOND: Thank you, your Honor.

7 THE CLERK: -- I just have a question. Are you going
8 to amend this summons (indiscernible) back to November 8th
9 (indiscernible)?

10 THE COURT: Just send --

11 MR. CARMEL: Amend --

12 THE COURT: -- a notice --

13 MR. CARMEL: -- the summons?

14 THE COURT: -- of continuance, not the summons. Just
15 set it on a continued date of the pretrial.

16 MR. CARMEL: I'll file an amended notice of hearing
17 or whatever is appropriate just so that it's in the court
18 record.

19 THE COURT: Great.

20 MR. CARMEL: And we'll send a copy to Mr. Cory.

21 THE COURT: All right. Great. Thank you.

22 MR. DIAMOND: Thank you, your Honor.

23 THE COURT: Okay. Then, finally, we have in
24 USA Investment Partners Poulin versus Marron.

25 MR. BURGER: Good morning (sic), your Honor.

1 Jerome Burger on behalf of Marron & Associates.

2 THE COURT: Okay.

3 MS. GRAY: Good afternoon, your Honor. Talitha Gray
4 on behalf of Lisa Poulin, the Chapter 11 Trustee.

5 THE COURT: All right. Thank you.

6 And, again, if any of you want to leave, I won't be
7 offended, so just do it quietly if you do. All right.

8 Go ahead, Counsel.

9 MR. BURGER: Okay. Well, the whole basis of any
10 liability on the part of Marron is the question of whether he
11 received and retained any benefits from any of these transfers.

12 The fact is as the complaint alleges any transfers
13 received were received on behalf of Ms. Tschopik and were, in
14 fact, turned over to Ms. Tschopik as the complaint alleges.

15 THE COURT: Well, why isn't it the dominion and
16 control issue a defense as opposed to something that they must
17 affirmatively plead?

18 MR. BURGER: Well, that is the question, your Honor.
19 It was not affirmatively pled --

20 THE COURT: I'm saying why --

21 MR. BURGER: -- in the complaint.

22 THE COURT: -- isn't it a defense as opposed to being
23 something that has to be affirmatively pled.

24 MR. BURGER: It should be affirmatively pled, but it
25 wasn't, so we raised it.

1 THE COURT: Okay. All right. Ms. Gray.

2 MS. GRAY: Your Honor, I would disagree that it was
3 not actually pled. The focus seems to be on one clause taken
4 out of the, you know, ten-plus page complaint.

5 The allegation is that Marron & Associates which
6 Ms. Tschopik was of counsel prepared her bills, submitted them,
7 deposited checks on her behalf, et cetera.

8 The purpose of including this statement was to expand on
9 that relationship. Certainly, at this point, we don't know
10 what the agreement was with regard to the funds that were given
11 to Marron & Associates.

12 But we have alleged that they were, in fact, transferred
13 to them, that they were deposited, that they received them, and
14 that, subsequently, after that some portion of them were then
15 provided to Ms. Tschopik, and that was as a result of
16 communications we had with her.

17 What their internal agreement looks like, whether
18 Marron & Associates retained half of it as a result of
19 administrative expenses that they were doing on her behalf,
20 whether they retained all of it, we don't know at this point.

21 But, certainly, I think it was clearly pled that they had
22 dominion over the funds and then subsequently transferred some
23 portion of them to Ms. Tschopik.

24 THE COURT: Okay. Any reply?

25 MR. BURGER: In fact, your Honor, the complaint does

1 not say some portion of the funds. The complaint -- excuse me
2 -- alleges that the funds were received, deposited on behalf of
3 Ms. Tschopik.

4 There are a number of conclusory statements, labels that
5 were applied as a substitute for factual allegations. In fact,
6 those allegations contain no support whatsoever.

7 There was a private agreement between Ms. Tschopik and
8 somebody else for the (indiscernible) litigation. Marron was
9 not a party to that.

10 Marron's agreement was with Ms. Tschopik to do her
11 billing, to receive the payments, and forward the payments on
12 to her.

13 There was no dominion over the funds. Marron had no
14 discretion. The complaint does not allege that Marron had any
15 discretion whatsoever on what to do with the funds. Merely,
16 that it was done on her behalf.

17 THE COURT: Okay. Well, I'm going to deny the motion
18 to dismiss. And, of course, I'm fully aware of the
19 Bell Atlantic/Twombly case which seems notwithstanding the
20 protestations of the Supreme Court to get us away from the
21 notice pleading because I think that they have adequately pled
22 that Marron received the money, and it was transferred to this
23 other person.

24 And we know that under 550 a recovery can be had from the
25 initial transferee or an immediate transferee or the person for

1 whose benefit it was made.

2 At this stage, it seems to me it's sufficient to say they
3 received the money. It's certainly a defense to say we had no
4 dominion or control, so, therefore, we're not an initial
5 transferee despite the fact that we physically got the money.

6 But they physically got the money, so that makes them an
7 initial transferee at least at first blush, and it seems to me
8 dominion and control is a defense.

9 I'm obviously not ruling that they did, indeed, have
10 dominion and control by denying the motion to dismiss. I am
11 just saying that their complaint is facially sufficient to
12 survive the motion to dismiss.

13 So your answer will be filed within, what, two weeks?
14 Will that work?

15 MR. BURGER: I think it should, your Honor.

16 THE COURT: Okay. And then do your discovery plan.

17 (Colloquy not on the record.)

18 THE COURT: When do we have a scheduling conference
19 set?

20 MR. BURGER: I --

21 MS. GRAY: I --

22 MR. BURGER: Do --

23 MS. GRAY: I believe it's the November 13th day, too.

24 THE COURT: Okay.

25 MS. GRAY: But I think the two weeks we should be

1 able to get a discovery plan together --

2 THE COURT: Okay.

3 MS. GRAY: -- pretty quickly --

4 THE COURT: Good.

5 MS. GRAY: -- on this.

6 THE COURT: All right.

7 MS. GRAY: So it shouldn't --

8 THE COURT: Thank you --

9 MS. GRAY: -- be a problem.

10 THE COURT: -- very much. All right.

11 Thanks, everybody.

12 MS. GRAY: Thank you.

13 THE CLERK: All rise.

14 (Court concluded at 04:15:51 p.m.)

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1 I certify that the foregoing is a correct transcript
2 from the electronic sound recording of the proceedings in
3 the above-entitled matter.
4
5

6 /s/ Lisa L. Cline

10/27/09

7 Lisa L. Cline, Transcriptionist

Date